(2)

Supreme Court
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IN THE SUPREME COURT

OF THE UNITED STATES

Cheri Smith,
Petitioner

Vs.

State of New Mexico

Respondent

SUPPLEMENT TO APPENDICES
FOR
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT
FOR THE OF
STATE OF NEW MEXICO
PETITION FOR WRIT OF CERTIORARI

CHERI SMITH
Petitioner, Pro Se
P O Box 10877
Tempe, AZ 85284
480-710-0947

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
COURT OF APPEALS OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,

Patricia R. Wallace

vs.
CHERI SMITH,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
John A. Dean, Jr., District Judge

STATE OF NEW MEXICO,

No. 23,725

Patricia A. Madrid — Attorney for Appellee
Attorney General
Santa Fe, New Mexico

Cheri Smith
Tempe, AZ — Pro se Appellant

MEMORANDUM OPINION

ALARID, Judge.

Defendant, pro se, filed a notice of appeal in this Court on January 10, 2003, and a docketing statement on the same date. [RP 509, 511] The notice of appeal appeals from the "Orders entered in the above entitled cause," but does not attach any copies of the orders appealed from. [See Rule 12-202(B) NMRA 2003; RP 509]

On March 26, 2003, Defendant filed an amended notice of appeal and amended docketing statement in this Court. [RP 558, 566] The amended notice of appeal states that Defendant is appealing "from the Motions filed in the above-entitled case," which were filed more than 30 days ago and therefore "deemed denied." [RP 558] The amended notice does not attach a copy of the motions appealed from. See Rule 12-202(B). This Court's calendar notice proposed summary dismissal for lack of a final order. Defendant has filed a memorandum in opposition and a motion to compel due process. Unpersuaded by the memorandum in opposition, we dismiss the appeal for lack of a final order.

DISCUSSION

1. Motion to Compel Due Process. The motion requests that this Court protect Defendant from the actions of the 11th Judicial District Court, which, Defendant alleges, are against Defendant's constitutional rights to due process, notification, and, according to Defendant, constitute perjury by the district court Judge and the prosecuting attorney. [Motion, 1-2] This Court does not have jurisdiction to specifically compel the district court to perform actions such as Defendant requests in the motion. See NMSA 1978, Section 44-2-3 (1953) ("The district court has exclusive original jurisdiction in all cases of mandamus, except where such writ is to be directed to a district court or a judge thereof in his official capacity, in which case the supreme court has exclusive original jurisdiction"). We, therefore, express no opinion on the merits of the allegations set forth in the motion.

Summary Dismissal for Lack of a Final Order.

In the memorandum, Defendant asserts that the summary of procedural facts set forth in the calendar notice is incomplete. [MIO 1-2] The purpose of the summary of facts set forth therein, however, was to point out that the substance of the action before the district court, which consists of the State's motions to revoke Defendant's probation [RP 330, 355, 415], have not yet been ruled upon, making Defendant's appeal to this Court premature. As such, as discussed in the calendar notice, this Court does not have jurisdiction to rule on the merits of the appeal as set forth in the docketing statement and Defendant's arguments raised in the memorandum. We remain persuaded that the operative facts, for the purpose of this Court's jurisdiction, are as set forth in the calendar notice. By arguing the merits of the appeal, Defendant's memorandum does not persuade us that the appeal is not premature.

A. Factual and Procedural Background.

Defendant was convicted, after a jury trial, of one count of embezzlement, one count of fraud, and once count of acting as an insurance consultant with a license while her license was suspended. [RP 183] Defendant appealed her conviction to this Court and a memorandum opinion was issued by this Court on November 20, 2000, Ct. App. No. 21,129. [RP 309] The opinion affirmed the district court's judgment, except for her conviction for acting as an insurance consultant without a license, which was reversed. [RP 317]

On September 28, 2001, the State filed a motion to revoke Defendant's probation. [RP 330] The State filed an amended motion to revoke probation, a second amended motion to revoke probation, and a third amended motion on October 26, 2001, December 6.2001, and on June 6, 2002, respectively. [RP 355, 415] Meanwhile, Defendant filed a motion to quash subpoena duces tecum relating to the State's subpoena of Defendant's bank records, which was denied by the district court on July 25, 2002. [RP 463] A hearing on the State's motion to revoke probation was set for September 19, 2002, and continued to October 25, 2002, then continued to November 20, 2002, and apparently continued to January 14, 2003, when Defendant did not appear and a bench warrant for her arrest was filed. [RP 465, 468, 470, 481, 534]

On October 31, 2002, the district court entered an order concerning filings by a non-party, which ordered Defendant's husband Richard Smith, who is not a party to this case, not to file any further pleadings, except filings dealing with issues of intervention. [RP 482] Also on October 31, 2002, the district court entered an order upon the issue of the admissibility of Defendant's bank records in her pending probation revocation hearing. [RP 484] In that order the district court determined that the bank records were "not only

22 relevant but essential to the Court in determining whether Defendant violated her 23 probation by failing to pay restitution as ordered by the Court." [Id.]

On November 18, 2002, Defendant's husband Richard Smith filed a notice of appeal to this Court. [RP 486] As a result of Richard Smith's appeal, this Court issued a memorandum opinion, affirming the district court's order that prohibited Mr. Smith *from "further* interjecting himself into the proceeding and alleging violations that have no legal remedy in this context." [RP 544, 545]

Meanwhile, Defendant filed a notice of appeal in this Court on January 10, 2003, and a docketing statement on the same date. [RP 509, 511] The notice of appeal appeals *from* the "Orders entered in the above entitled cause," but does not attach any copies of the orders appealed from, [See Rule 12-202(B) NMRA 2003; RP 509] On January 14, 2003, the district court filed a bench warrant for Defendant's arrest for failing to appear at the probation revocation hearing. [RP 534] Defendant's counsel filed a motion to withdraw, which was granted by the district court. [R 536, 538] Defendant then filed a motion to quash bench warrant on January 21, 2003. [RP 539] The motion asked the district court to set a

hearing on the motion to quash bench warrant. [RP 540] Meanwhile, it appears that Defendant filed a lawsuit in federal district court against the district court judge in this case, which was dismissed with prejudice. [RP 547-551]

On March 26, 2003, Defendant filed an amended notice of appeal and amended docketing statement in this Court. [RP 558, 566] The amended notice of appeal states that Defendant is appealing "from the Motions filed in the above-entitled case, which were filed more than 30 days ago and therefore "deemed denied." [RP 558] The amended notice does not attach a copy of the motions appealed from. See Rule 1.2-202(B).

B. Appeals from Final Judgments. It is clear from the record summarized in detail above, that the case before us, at this time, does not concern the underlying judgment and sentence which Defendant already appealed to this Court and which resulted in a Memorandum Opinion affirming her convictions in part and reversing in part. Rather, the case before us at this time concerns whether Defendant has violated the terms and conditions of her probation. As such, this case began with the State's three motions to revoke Defendant's probation. The record reflects that the district court has not yet

ruled on whether the State is entitled to revoke Defendant's probation. See, e.g., State v. Garcia, 99 N.M. 466, 471, 659 P.2d 918, 923 (Ct. App. 1983) (stating that in a criminal case, the final

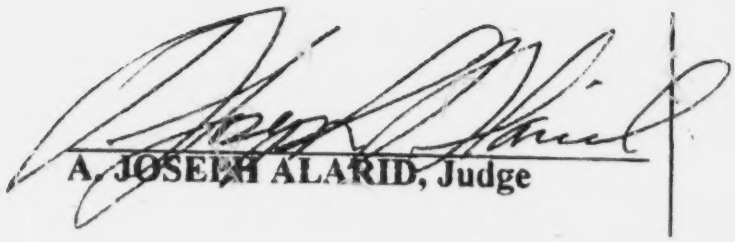
judgment is the judgment and sentence or an order dismissing all the charges against the defendant.).

The orders and motions Defendant purports to appeal from, presumably, concern the district court's order to allow the admission of Defendant's bank records as relevant and essential to the probation revocation determination and Defendant's motion to quash the bench warrant for not appearing at the hearing on the motions to revoke Defendant's probation. These orders and motions, however, appear not to be a final determination of whether Defendant's probation should be revoked. In fact, it appears that the hearing on the State's motions to revoke Defendant's probation has not yet taken place with Defendant in attendance. See Rule 12-201(A)(2) NORM 2003; see also, e&., Clancey v. Gooding, 98 N.M. 252, 254, 647 P.2d 885, 887 (Ct. App. 1982) (stating that, "New Mexico courts have repeatedly held that a judgment or order is not final unless all issues of law and of fact necessary to be determined were determined, and the case has been completely disposed of to the extent the court has power to dispose of it.").

CONCLUSION

We dismiss the appeal for lack of a final order and remand to the district court for further proceedings.

IT IS SO ORDERED.

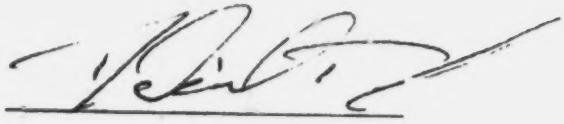


A. JOSEPH ALARID, Judge

WE CONCUR:

ES J.WECHSLER, Chief Judge

RODERICK T. KENNEDY, Judge



IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO	)	
	)	
Plaintiff/Appellee	)	Case No. CR 98-935-1
	)	Court of Appeals Case 23, 725
vs.	)	
	)	Court Div I San Juan Cnty, N. M.
CHERI SMITH	)	
	)	Honorable William C Birdsall
Defendant/Appellant	)	District Judge
	)	

AMENDED DOCKETING STATEMENT

Dated this
26th day of
March, 2003

By: Cheri Smith

Cheri Smith
P O Box 10877
Tempe, AZ 85284
crsmith82@yahoo.com

Appendix R

1. **Statement of the nature of the proceedings.** The Appellant was tried in 11th Judicial District Court August 1999. The Appellant was convicted of Embezzlement and Fraud, both Third Degree Felonies, and a Misdemeanor Charge of Acting as an Insurance Consultant without a License. Appellant was sentenced February 07, 2000, Judgment & Sentence. On February 23, 2000, Appellant turned herself in to serve her sentence. On February 23, 2000 Notice of Appeal was given. The Court of Appeals final disposition of the case was November 17, 2000. The Appellate Court's Order instructs 11th Judicial District Court to dismiss the Misdemeanor Charge of Consulting without a License. February 7, 2001 Appellant is released from New Mexico Woman's Correctional Facility, with Parole approved through Interstate Compact to the State of Arizona. Interstate Compact Cooperative Report dated February 08, 2001 was sent to New Mexico Adult Parole & Probation/New Mexico Interstate Compact/ Department of Corrections. On November 13, 2001, one year after the Memorandum Opinion is signed, District Court is advised in a hearing (Motion to Revoke Probation) that the directive from the Court of Appeals had not been done. The Court states,

"That they had that and that it had been, he thought." The State District Attorney states, "It had been done." On November 15, 2001, the Court adding six months, which the Court of Appeals had directed the Court to dismiss, signs an Order of Probation. The State filed a Motion to Revoke Probation on September 28, 2001 The New Mexico Adult Parole & Probation Department did no referral, nor did Arizona Adult Parole & Probation Department. The Appellant filed a response to the Motion pro se. An Amended Judgment & Sentence is done December 2001. Appellant files motion for Court appointed Counsel. Appellant & Husband found out that the State has issued various subpoenas to other parties, without serving Appellant or her husband, and obtaining personal information, from their Landlord, Wells Fargo, and U.S. West before trial in the above entitled case. The State of New Mexico (District Attorney) served a Subpoena on Wells Fargo Bank on October 30, 2001 to obtain Bank records of Richard Smith, who is primary owner of account; Cheri Smith is authorized signer on said account. This was done contrary to NMSA 1978 §14-7-1, NMRA 5-103, and N.M. Constitution Article II §10. Counsel of Appellant advises the Court of

violation of illegal search and seizure in May 3, 2002 hearing. The Court allows the State to issue another subpoena (July 25,2002) to obtain records already obtained illegally as well as current information knowing what is there. State District Attorney commits perjury in the 11th Judicial Court on November 13, 2001. State District Attorney committed Deceit upon the Supreme Court in the request for extension to try Appellant. Court never hears motions that have been filed Appellant Pro Se, including Motion to Dismiss, filed on November 13, 2001 (RP 385). Appellant has returned to the Court 10 times over 16 months for the Motion to Revoke (RP 330) (Amended Three Times) filed by State District Attorney on September 28, 2001. The State District Attorney has called Appellant's Employers past and present to have them testify in the above matter, causing the Appellant to lose her position. These communications were held without the presence of Appellant or Counsel.

Appellant's husband filed appeal (23,600) to Court of Appeals for review of the illegal search and seizure of his bank records, on November 16, 2002. Docketing Statement was filed in District Court on November 19, 2002 (RP 488) and on

November 20, 2002 the Court had a hearing after being duly informed of New Mexico Court of Appeal Case 23,600. In the November 20, 2002, the Court allowed information obtained from said bank records into the records, the basis of said appeal. Court then verbally finds that Appellant violates her probation. Appellant then files an Appeal (23,725) and The Notice of Appeal and Docketing Statement are filed in the 11th Judicial District Court, on January 10, 2003 (RP/SRP 509). The 11th Judicial District Court then has a hearing on January 14, 2003 which the Appellant is not aware of, and the Court issues a warrant for her arrest. The Appellant files Motion to Quash, but the 11th Judicial District Court does not hear, thus it is deemed denied.

2. **Jurisdiction.** The Amended Notice of Appeal is timely filed. This Amended Docketing Statement is filed within thirty (30) Day of the Amended Notice of Appeal per N.M.R.A. 12-208. Motions filed in the above entitled case, which have not been heard or ruled on by the 11th Judicial District Court, filed more than 30 days ago, therefore deemed denied. Double jeopardy that the Court has placed Defendant under can be appealed at any time.

3. **Statement of the case.** The State of New Mexico took Appellant before a Grand Jury to obtain an indictment, November 1998. Appellant appeared before Judge Harrison on November 16, 1998. Appellant was released with a $50,000 bond. Judge George Harrison is recused as Judge on November 25, 1998 (RP 9) reassigned to Larry Thrower. Mel O'Reilly was hired as Counsel entering his appearance December 2 1998. Motion filed to Compel Disclosure (RP12), Request for Grand Jury Proceedings (RP 14) Appellant was taken before grand jury October 23, 1998, and November 6, 1998 (RP 1-RP 3). The first grand jury resulted in Charges filed in case 98-899-6; the second Grand Jury resulted in Charges filed in case 98-935-1. Case 98-899-6 was dismissed due to 5-604, time element, June 25, 1999. The State added misdemeanor charges from CR 98-899-6 to the second Case No CR98-935-1. The charges in both cases were from the continuing act. The Appellant was tried in 11th Judicial District Court August 1999. The Appellant was convicted of Embezzlement and Fraud, both Third Degree Felonies, and a Misdemeanor Charge of Acting as an Insurance Consultant

without a License. Appellant was sentenced February 07, 2000, Judgment & Sentence. On February 23, 2000, Appellant turned herself in to serve her sentence. On February 23, 2000 Notice of Appeal was given. The Court of Appeals final disposition of the case was November 17, 2000. The Appellate Court's Order instructs 11th Judicial District Court to dismiss the Misdemeanor Charge of Consulting without a License. February 7, 2001 Appellant is released from New Mexico Woman's Correctional Facility, with Parole approved through Interstate Compact to the State of Arizona. Interstate Compact Cooperative Report of February 8, 2001 was sent to New Mexico Adult Parole & Probation/New Mexico Interstate Compact/ Department of Corrections. Terms & Conditions imposed by Arizona are included The Interstate Compact Cooperative Report addressed the Judgment & Sentence order of February 7, 2000. The Interstate Compact allows the Conditions of Parole & Probation to be addressed by the receiving state; the sending state shall conform to these changes. Arizona Interstate Compact Adult Parole & Probation did, as the Law requires, New Mexico Interstate Compact Deputy Administrator verifies that this was done, and that New

Mexico could not violate my Probation. New Mexico wanted a promissory note signed for restitution, however, this was not presented to Appellant until November 06, 2001, nor was the Order of Probation, when it was Appellant was told she had to sign. The State of New Mexico (District Attorney) filed a Motion to Revoke Probation on September 28, 2001, prior to issuance of Order of Probation, against Appellant in this criminal case, and the Court issued a summons. Neither The New Mexico Adult Parole & Probation Department/ Interstate Compact or The Arizona Adult Parole & Probation Interstate Compact did any referral. Parole and Probation has been granted to the State of Arizona, Parole February 7, 2001 and Probation was completed January 2003. The State of New Mexico (District Attorney) served a Subpoena on Wells Fargo Bank on October 30, 2001 to obtain Bank records of Richard Smith, who is primary owner of account; Cheri Smith is authorized signer on said account. This was done contrary to NMSA 1978 §14-7-1, NMRA 5-103, and N.M. Constitution Article II §10. Subpoena was not served to Appellant or Richard Smith. Wells Fargo sent said records on November 7, 2001 to State of New Mexico District Attorney. Wells Fargo

notifies Appellant and her husband, after the records were sent. State of New Mexico has filed three Amended Motions to Revoke Probation (RP 330 , RP 355, RP 432)) and Judgment and Sentence. Appellant filed Motion to Quash Illegal Search & Seizure of Bank records on November 13, 2001. On November 13, 2001, The Court was advised of the Illegal Search & Seizure of Bank Records, as well as the perjury of the District Attorney. On November 9, 2001 Appellant files for Appointment of Counsel (RP 361). On November 15, 2001, an Order of Probation is signed by the Court adding six months, which the Court of Appeals had directed the Court to dismiss, and in the Order of Probation includes the conditions, which Arizona said would not be enforced, thus putting Appellant in harms way, and violating Federal Law of Interstate Compact *4 U.S.C. § 112* for Adult Offender Supervision. Appellant borrows funds to hire Counsel on November 26, 2001. May 3, 2002 State of New Mexico presents a copy of bank records to Counsel of Appellant and plans to introduce records that were obtained in violation of to U.S. Constitution, N.M. Constitution Article II, Section 10, and contrary to NMSA 1978 §14-7-1, NMRA 5-103, and

N.M. Constitution Article II §10. The Court does not hear Motion to Quash until June 6, 02. In the hearing of June 6, 2002 The State gives verbal notice of second Subpoena that is going to be served on Wells Fargo to correct prior Illegal Search & Seizure of Bank Records already knowing what is said account since they were obtained illegally previously. Appellant's Counsel stated that the evidence obtained illegally could not be used. The Court instructed The State of New Mexico, the moving party that notice is sent to Richard Smith and Appellant is served to obtain records. On June 11, 2002, Appellant and Richard Smith received a subpoena. On June 21, 2002 a Motion and Amended Motion was filed to Quash Subpoena Duces Tecum. On July 10, 2002, a hearing was held in 11th Judicial District for the second Subpoena Duces Tecum. On July 26, 2002, Richard Smith notified Wells Fargo of Motion to Quash Subpoena Duces Tecum had been filed. On July, 27, 2002 with out Richard Smith receiving a copy of the Order issued by The Court on July 25, 2002 said Bank Records are again sent to the State of New Mexico violating The U.S. Constitution, N.M. Constitution Article II, Section 10. Richard Smith files a motion to Quash Illegal Search & Seizure of

Bank Records on October 15, 2002 and an Affidavit in support thereof. On October 31, 2002 the Court files "Order Concerning Filings by a Non-Party", and "Order Upon In Camera Review of Appellant's Bank Records."

On November 16, 2002 Richard Smith filed appeal (23,600) to New Mexico Court of Appeals for review of the illegal search and seizure of his bank records. Docketing Statement was filed in District Court on November 19, 2002 (RP 488) and on November 20, 2002 the Court had a hearing after being duly informed of New Mexico Court of Appeal Case 23,600. In the November 20, 2002, the Court allowed information obtained from said bank records into the records, the basis of said appeal. Court then verbally finds that Appellant violates her probation. The conditions that Arizona said would not be enforced. Appellant then files an Appeal (23,725) and The Notice of Appeal and Docketing Statement are filed in the 11th Judicial District Court, on January 10, 2003 (RP/SRP 509).

The 11th Judicial District Court then has a hearing on January 14, 2003 which the Appellant is not aware of, and the Court issues a warrant for her arrest. The Appellant files Motion to

Quash, but the 11th Judicial District Court does not hear, thus it is deemed denied.

4. **Statement of issues.** The issues raised by this appeal are:

I. **First Issue - Double Jeopardy** – N.M.S.A. 31-1-10 No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. Court of Appeals files Memorandum Opinion (RP 309) on November 20, 2000, which dismisses the misdemeanor conviction (Collateral Estoppels). On November 13,2001 a hearing was held and Appellant advised the 11th Judicial District Court of The New Mexico Court of Appeals Memorandum Opinion:

(November 13, 2001 Page 4, Line 6)

> Judge William Birdsall - "…. I have a copy of that. The State will need to do an amended Judgment & Sentence that reflects the- I think they in effective dismissed it. I'm not sure."
> Assistant District Attorney Sandra A Price - "Yes, we did your Honor."
> Judge William Birdsall -" Let's go ahead and do an amended Judgment & Sentence that would reflect that so we'll have a clean slate on that."

The Court and San Juan County District Attorney states on the record in a legal proceeding on November 13, 2001 that the Conviction was dismissed, however as of November 13, 2001

there was no Order nor an Amended Judgment & Sentence completed to dismiss. The 11th Judicial District Court signs order of probation on November 15, 2001. (RP 405) adding the six months sentence which was dismissed. 11th Judicial District Court acknowledges in the November 13, 2001 hearing that it would be a mathematical deduction. The Amended Judgment & Sentence was filed December 4, 2001. In the hearing of February 8, 2002 the 11th Judicial District Court was advised of the six months still being on the record. As of March 24, 2003, the Order of Probation still places Appellant in double jeopardy.

(February 8, 2002 Page 9, Line 3)

> The Court: So then the argument is that we had six-year—a six year sentence, less a year and a half of incarceration, would leave four and half years of supervised probation.
> Mr. Whitehead: You imposed five, I believe.
> The Court: Well, there may have been some—who knows.

(July 10, 2002 Page 5, line 13)

> The Court: "well, what residual rights does the defendant have in that regard, considering the fact the she is a probationer and, I think, parolee after having been convicted of a felony or felonies and released under supervision?"

The Judiciary Code of Conduct requires the Court's to know their case load as well, as well as the rights of the Appellant.

In case 98-899-6 Appellant was indicted by the Grand Jury on October 23, 1998 on seven counts including fraud, or in the alternative embezzlement, charges of forgery, perjury, insurance code felonies and misdemeanors. (RP 114). The case was dismissed for 5-604, NMRA 1999 on June 23, 1999 (RP 114). The District Attorney brings a second grand jury indictment on November 6, 1998 (RP 1-RP 3) for additional charges from the same continuing act, as well as adding 6 misdemeanor charges on June 25, 1999 (RP 94-RP 95). 11th Judicial District Court is informed (RP 103-RP 104) that it is double jeopardy and a violation of U.S. Constitution, Article V, and State of New Mexico Constitution, Article II, Section 15 (RP 103 -#1). Appellant's Counsel submitted there could be only one prosecution for a continuing crime. (RP 104 -#4) The charges were brought by a Grand Jury Indictment for case CR 98-899-6 and a second grand jury for Case 98-935-1. The charges were dismissed as a result 5-604, not by the State. The charges filed are the same for the continuing crime. (RP 104-#3) The testimony shows the same continuing act by Appellant.

(August 24, 1999 Page 80, Line 2)

Sandra Price: Was she your insurance agent from 1991 to 1998?
Toni Wilkins: Yes

Ex Parte Nielsen, 131 U.S. 176

> "It will be observed that all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal."

The Conviction should be reversed due to Doubled Jeopardy and the harm it has placed upon Appellant.

II. **Second Issue- Illegal Search & Seizures, Motions & Orders**

.The Appellant and Richard Smith have an expectation of privacy in their bank records and telephone records, under the United States Constitution and New Mexico Constitution. The rights given an individual by a statute may be an enlargement of the constitutional guarantees a right afforded an individual by the legislature is nonetheless a right whether it is an enlargement of a constitutional or a legislative right. Statutes may enlarge constitutional rights but they may not impinge upon, conflict with, or reduce constitutional protections. All evidence is general admissible, unless obtained unlawfully or illegally against due

process and the exclusionary rule would apply. There is a process by which telephone and bank records can be obtained. Due Process requires notification of all parties prior to obtaining said records. Service a subpoena must be on all parties. The Appellant has the same rights and expectations that other parties do with respects to an illegal search and seizure the exclusionary rule **does** apply in probation hearings. The San Juan County District Attorney has previously unlawfully obtained Appellant's records from the same bank (Wells Fargo) for use in a probation revocation hearing as well as other bank records (Sun West Bank) and telephone records (U. S. West, a/k/a Qwest) (RP 443-RP 444) prior to trial. Appellant is not informed of Subpoena to Sun West or U S West till after she has been sent to prison. (RP 378 to RP 384). Due Process mandates that all parties are notified upon service of a subpoena. A fraud perpetrated upon the Person/Company being served. Fraud is an element in the RICO ACT (RICO) Act, 18 U.S.C. §§ 1961-68 (1994), NMSA 30-42-1 to 30-42-6 , Racketeering

NMSA 30-42-3 (D)

> "pattern of racketeering activity" means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited

> activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of the incidents occurred after the effective date of the Racketeering Act and the last incident occurred within five years after the commission of a prior incident of racketeering"

STATE v. EDER, 103 N.M. 211 *(App. 1985)* 704 P.2d 465

> "The same reasoning applies to compelling witnesses to produce documents with unauthorized subpoenas. The practice has been deemed coercive and intimidating. To the extent that an unknowing witness may feel compelled to attend or produce documents, the practice amounts to perpetrating a deceit on the witness. NMSA 1978, Code of Prof.Resp. Rule 1-102(A) (4) (Repl. Pamp. 1982) defines misconduct as including engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."

Said records from Wells Fargo should be excluded as fruits of the previous illegal search and seizure of Appellant's bank records on October 30, 2001 (RP 382). The Subpoena was that the State served to Wells Fargo Bank was not served Appellant or her husband a Motion was filed to Quash Subpoena Duces Tecum

May 3, 02, Page 4, line 16

> Mr. Whitehead: Court's attention, since Ms. Price gave me a stack of bank records that she, apparently, plans to introduce under the motion to quash, and I have a subpoena for those records because they were obtained in violation of New Mexico statue."

May 3, 02, Page 5, line 4

Mr. Whitehead: Yes. The only records I've been provided have been from Wells Fargo.

On July 10, 02 a hearing is held in regards to obtaining the same Wells Fargo Bank records which were previously obtained by The State as a result of an illegal search and seizure. A second Subpoena is served upon the Appellant and her husband for the Wells Fargo Bank records. The second Motion to quash if filed for Appellant by Mr. Whitehead and Mr. Smith files his Pro Se. The Bank is served the Subpoena the bank notifies the Appellant, and Mr. Smith, a copy of the Motion to Quash Subpoena Duces Tecum is sent to Wells Fargo Bank. The Honorable Wm. C Birdsall signs an Order allowing the Subpoena, Counsel and Mr. Smith was not notified prior to Order being signed. (RP 463) (See Sixth Issue)

> STATE V. MARQUART, 123 N.M. 809 *(App. 1997)* 945 P.2d 1027
>
> The Defendant has the same rights and expectations that other parties do with respects to an illegal search and seizure the exclusionary rule does apply in probation hearings.

It is not a question of reissuing a subpoena to comply with State Statue; it is a matter of an illegal search and seizure of which the

fruits must not be allowed. It is none the less a right that the Appellant and her husband, guaranteed by due process, under the United States Constitution and that of the Constitution for the State of New Mexico.

> NMRA LR11-103 (C) Submission of orders, judgments, briefs, and findings
>
> C. "Orders, decrees, and judgments shall not be submitted to the court for signature unless they have been initialed by all attorneys of record or unless the attorney submitting same certifies to the court that opposing counsel has, after five (5) days of receiving the order, decree, or judgment, failed or refused to initial same."
>
> MONTANO v. ENCINIAS, 103 N.M. 515 (1985) 709 P.2d 1024
>
> "In any event, we direct that judgments or orders in New Mexico shall not be entered in the court record in anonymity. If such a document does not indicate by counsel's signatures that all parties affected have seen it before it is presented for the judge's signature, the judge shall be satisfied by proof of service that notice of presentation has been given to attorneys for all parties."

The ORDER ALLOWING THE ISSUANCE OF SUBPOENA DUCE TECUM (RP 463) of the 11th Judicial District Court should be dismissed for due process.

III. **Third Issue- Due Process & timely hearing violated by Motion for Revocation of Probation filed without referral from**

NM Adult Parole & Probation or AZ Adult Parole & Probation . Order of Probation is signed on November 13, 2001. Motion for Revocation is filed by San Juan County District Attorney on Sept 28, 2001. Any Parole or Probation Revocation must have an Independent Finding of Facts.

GAGNON v. SCARPELLI, 411 U.S. 778 (1973)

> " Due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in Morrissey v. Brewer, 408 U.S. 471, in the case of a parolee."

MORRISSEY v. BREWER, 408 U.S. 471 (1972)

> "At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole."

There has been no fact finding, evidence was not presented to Appellant, and 16 months with 10 hearings is not timely. Appellant filed Motion to Compel District Attorney & San Juan County Parole & Probation Office to Release Information in Appellant's

File In Above Entitled Case. (RP352) Motion to Compel Disclosure (RP 374). Appellant has never seen anything from District Attorney or State of New Mexico. Appellant has not received disclosure, nor has Counsel.

May 3, 02, Page 5, line 4

Mr. Whitehead: Yes. The only records I've been provided have been from Wells Fargo.

IV. Fourth Issue- State of New Mexico must comply with Interstate Compact Adult Parole & Probation Requirements. 4 U.S.C. § 112 allows Interstate Compacts, and State of New Mexico (N.M.S.A. 31-5-20) and State of Arizona (A.R.S.31-467) are parties to the Federal Interstate Compact and the U.S.C. A. 14th Amendment (Due Process).

CAMERON v. MILLS, (S.D.Iowa 1986) ***645 F. Supp. 1119***

> Within this area, apparently, a compact that does not receive congressional consent will not be invalidated for lack of consent, but a compact that is consented to by Congress will thereby become federal law....Thus, the final stage in this analysis is whether Congress has already consented to the compact between Iowa and Kansas. This Court believes that it has. In 4 U.S.C. § 112(a), Congress provided:
>
> > The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the

prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements in compacts.

Examination of this statute's legislation history demonstrates that Congress also intended this statute as approval for interstate corrections compacts

Jurisdiction is therefore Federal Court not State District Court.

Interstate Compact Cooperative Report February 08, 2001 was sent to New Mexico Adult Parole & Probation/New Mexico Interstate Compact/ Department of Corrections. New Mexico Interstate Compact (RP 400). Acknowledges that Arizona has set terms and conditions under the Interstate Compact. Investigative report was admitted into evidence in hearing on November 20, 2002. Arizona Interstate Compact sets terms of supervision:

Third Paragraph Arizona states:

" On Page 2 of New Mexico's Investigation Request, there is a request involving the offender's criminal record and copies of this to be signed by prospective employers..."Arizona does not require employers to see an offenders record..."
"Would New Mexico please send this officer the information offender Smith needs on where and when to start her court ordered payments."?

The Interstate Compact allows the Conditions of Parole & Probation to be addressed by the receiving state; the sending state shall conform to these changes

Section 2-110 (A) in part:

> "Any Receiving State which choose not to enforce or is not able to enforce a special condition placed upon a parolee or probationer by the sending state shall notify the sending state, as soon as is possible, that the special condition will not be enforced."

Section III- Eligibility for Supervision (C):

> "Offenders will comply with the conditions of supervision imposed by both sending and receiving states. The receiving state may impose its own special conditions and shall notify the sending state of such condition as soon as possible. If the receiving state chooses not to, or is unable to enforce a condition of supervision imposed by the sending state, the receiving state shall notify the sending state immediately."

Arizona Interstate Compact Adult Parole & Probation did, as required by Law, New Mexico Interstate Compact Deputy Administrator verifies that this was done, and that New Mexico could not violate my Probation or Parole.

New Mexico Interstate Compact Deputy Administrator Celeste Casias States:

> "Assistant District Attorney in Farmington had filed a petition to revoke your probation Ms.

> Standerwick stated she had nothing to do with the petition and that the ADA had initiated this action".... "You asked me to contact Ms. Sandra Price, ADA in San Juan County; I did so at your request. I informed Ms. Price as to what occurred with your probation and miscommunication between the Probation Office, the Parole Office and Interstate Compact. Ms Price informed me that she was not seeking revocation of your probation that she wanted clarification and a promissory note signed as to your restitution."

New Mexico wants a promissory note signed for restitution; however, this was not presented to Appellant until after November 1, 2001. When the promissory note was presented, Appellant was told she had to sign, she could not refuse.

Arizona spoke to State of New Mexico District Attorney and Farmington Adult Parole & Probation Office indicating we needed clarification on where to send restitution. Copy of Memo from Arlin Chester to Linda Standerwick. Under Interstate Compact (Federal Regulation) the receiving states has jurisdiction of the supervision, not the sending state. Terms & Conditions were added to Order of Probation in violation of Federal Law of Interstate Compact for Adult Offender Supervision. The condition of informing my employer of said conviction would not be allowed by Arlin Chester, AZ Department of Parole & Probation.

November 20, 2002 Transcript Page 61 Line 10- Page 63 Line 5.

Mr. Whitehead:
Judge, the reason I asked those questions were because her probation and parole were transferred to the State of Arizona and her parole officer modified that condition of her supervision, as he is allowed to do so under the interstate compacts, and he notified the State of New Mexico Interstate Compact Office that he was modifying that condition.

And the fact is that she is to disclose to any prospective employers the nature of conviction and parole status when the employment involves any handling of any monetary funds.

Ms Price:
Your Honor, again, that doesn't change what this Court ordered Ms. Smith to do and—as a term. And the State has—if you look at our third amended motion to revoke probation and judgment of the sentence, she has violated what this Court told her to do, and I don't believe any parole officer can change what this Court ordered Ms. Smith to do.

And you asked, actually, as part of the judgment sentence order, that she notify any employer, not just this dealing in money, but any employer of her conviction in writing. Any, Your Honor, I don't believe that Ms. Smith—her parole officer can change what this Court has ordered her to do.

The Court:
Well, I don't know whether the parole officer can or can't, but then what's the Appellant to do?

Mr. Whitehead:
Section 2-110 of the Interstate Compact specifies the receiving state may choose not to enforce any special condition placed upon the parolee or probationer and

shall notify the sending state as soon as possible whether or not they're going to enforce the schedule, which they did—

Ms. Price:
Your Honor, we are not trying to revoke her parole. We've been through this previously. It is an order of her - - her probation that she – well, and also Judge, you ordered her. You stood—she stood in front of this Court and you ordered her to notify any employer. And if we need to pull the tape, it's definitely part of the judgment and sentence. You ordered her to notify her employer, not just those dealing in money, but any employer of her felony conviction, in writing.

Judge, we're not filing a motion to revoke her parole. She was on notice by this Court and her probation officer that she must notify any employer of her felony conviction.

Mr. Whitehead:
Judge, her probation was also transferred to Arizona with the Interstate Compact, and her probation conditions are the same as parole conditions.

The District Attorney does not acknowledge the Constitutional rights of Appellant and even states that no one could change what the 11th Judicial District Court ordered. (See Eleventh Issue) The 11th Judicial District Court was informed that this Federal Law. (See Eighth Issue)

V. **Fifth Issue- Appoint of Counsel by Court**. Appellant filed motion for appointment of counsel. (RP 361-RP 371) When a

Liberty Interest is in jeopardy, Appellant should have counsel appointed.

November 13, 2001 Page 3, Line 6

> "They can do anything at all that they want to do, and some of these motions are not going to go anywhere, ma'am, but we need to get you an attorney in order for you to have adequate representation."

November 13, 2001 Page 6, Line 20

> Ms. Smith: "And if they declare I that I'm not eligible where do we go from there, Your Honor?"
> The Court: "You'll have to hire yourself and attorney or you'll be pro se, representing yourself.
> Ms. Smith: "Okay. You will allow me to go pro se, Your Honor?"
> The Court: "Reluctantly I'll have no choice, Ma'am."
> Ms. Smith: "Can you Order me an attorney at that point if they determine I'm not?"
> The Court: "No. I can't order you an attorney. If you are not financially qualified to have a Public Defender appointed, then you will either hire an attorney with your own money or you will be here on your own. Okay?"

The Court refuses to appoint counsel thus leaving Appellant to borrow money to obtain counsel. Financial capabilities of Appellant were not even considered by the Court. Under the United States Constitution and New Mexico State Constitution it guarantees Counsel is to be appointed if you cannot afford one.

STATE EX REL. QUINTANA v. SCHNEDAR, 115 N.M. 573 (1993), *855 P.2d 562,*

> The inherent power of the judiciary to appoint counsel for indigent defendants is within the unique province of the courts to ensure the constitutionality of criminal prosecutions

VI. Sixth Issue -Right to be Heard & Notification of Hearings

November 13, 2001 Page 3, Line 6

> "They can do anything at all that they want to do, and some of these motions are not going to go anywhere, ma'am, but we need to get you an attorney in order for you to have adequate representation."

When Appellant's Husband wanted to be heard in the hearing of November 20, 2002, Richard Smith requests to be heard and the Court States:

November 20, 2002, Page 6, Line 22 & 23

Mr. Smith: May I Speak, Your Honor?
The Court: I'll chat with you, Mr. Smith when I need to. Thank You.

The 11th Judicial District Court does not hear or rule on motions filed by Appellant. Motions from October 2001 (RP 332) to March 24, 2003 (RP5??) have not been heard, with the exception of the Motion to Revoke (filed by District Attorney) and Motion to Quash Subpoena Duces Tecum, which the 11th Judicial Court denied. Due Process mandates notification of hearings, Appellant

has never been notified by the Court of the hearings (RP 354, RP 410, RP421, RP 425, RP 427, RP 461, RP 464, RP469, and RP481). Appellant's name has a line drawn through it. Motions that Appellant has filed have never been heard or ruled on. The Record Proper will show that any motions or orders filed were not sent to Appellant, (RP 331, RP 356, RP358, RP 414, RP 416, RP418, RP 463) Due Process requires notification of such hearing, a fundamental error occurs when it is not.

NMRA LR 11-101 (B) Setting of the trial and hearings

> B. "All settings made by the court shall be binding upon **all parties** and attorneys properly noticed. No setting shall be vacated except upon good cause shown by written motion."

Appellant is a party and therefore should have been notified. Appellant was not notified by the 11th Judicial District Court, of a hearing on January 14, 2003 and as result of the negligence of the11th Judicial District Court, a Warrant for her arrest was issued. A motion to dismiss was filed on January 22, 2003 the 11th Judicial District Court does not hear the motion just as it has a history of. Thus it is deemed denied.

> STATE v. VEGA, 91 N.M. 22 (1977) 569 P.2d 948 as referred to:

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84
A.L.R. 527 (1932) states:

"It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

The warrant should therefore me dismissed.

XII. **Seventh Issue- Perjured Testimony & Right to Confrontation.** Transcript verifies Appellant was not afforded the testimony of Gilbert Lopez, State of New Mexico, Investigator. He was listed on Witness List, (RP 87) However, in Judge's Chamber he was not allowed to testify. If Lopez had testified his report would have been brought up and the District Attorney knew she withheld it.

August 26, 2001 Page 81 Line 11

The Court: The Defense has indicated a desire to call a Mr. Lopez; is that correct?
Mr. O'Reilly: that is correct, your Honor.
The Court As I understand it, he is a representative of the Workers Compensation Administration, and it would be – what his testimony would be, would be to the effect that the arrangement whereby Bubble City, Inc. became Bubbles, Inc., and thereby reduced its workers' compensation modifier would have been considered fraudulent, a fraudulent practice under New Mexico

> Workers' Compensation Administration rules, regulations and statues. Am I correct in that?
> Mr. O'Reilly: Yes.
>
> The Court: And he's right, it would be. However, we've had testimony both ways as to the involvement of both parties. On the one hand, I've determined not to allow that testimony, because it speaks of a specific instance, it we're tacking about impeachment of the Wilkinses, rather than a general reputation for honesty 0r veracity or whatever. And then on the other hand, if it went against the defendant, which it might, it would also be improper and prejudicial. Did you want to make a record on that, Mr. O'Reilly?

Mr. Lopez testified at the Grand Jury, he should have testified at the trial, especially since he was listed as a witness for defense and prosecution.

Appellant has a right to confront the witnesses against them. Perjured Testimony should be rebutted. In the August 99 Trial Joe Wilkins committed perjury and testifies to calling a witness (Ed Burton) for the defense and telling him to change his story. Joe Wilkins was asked if a Lien had ever been filed against Cheri Smith or Red Apple Valley in his behalf. He indicated no. A hearing was held in the Judges Chambers and it was ruled that the Appellant could not have defense witness Joyce Johnson from San Juan Hospital was ready to testify that Joe Wilkins had not told the

truth about a Hospital Bill Lien filed against Cheri Smith or Red Apple Valley Insurance.

August 26, 1999 Conference in Chambers Page 84, Line 1

> The Court: Okay. We'll go on the record in State of New Mexico versus Cheri Smith, CR-98-935-1. We've been—we're in chambers. Appellant is present with Counsel; State is present by counsel. We've discussed an issue that the defense has raised about proffering testimony from a representative of the accounting or bookkeeping department of San Juan Regional Medical Center to the effect that testimony would be presented by a Joyce Johnson that Joe Wilkins, one of the witnesses who has testified previously and who is semi-alleged victim, or an alleged semi-victim—I don't know, he's sort of an alleged victim in this case—had earlier testified that he knew nothing of a hospital lien that was placed against Red Apple Valley Insurance by San Juan Regional Medical Center involving medical bills owed by Mr. Wilkins…As I understand it, the testimony from Ms. Johnson would be that Mr. Wilkins did, in fact, have some knowledge of the issue, because she'd communicated with him concerning that. There may also, but we're not concerned at this point, might be testimony, or might not, from Ms. Johnson as to whether she has personal knowledge to the fact that the Appellant, Ms. Smith, then, in effect straightened the matter out…. Am I relating that accurately, Mr. O'Reilly?"
>
> Mr. O'Reilly: That is correct your Honor.

August 26, 1999 Conference in Chambers Page 85, Line 11

> The Court… I'm not going to allow the testimony, but not on that reason. I think that it is too peripheral to the issues. I understand the defense's position it would

> tend to contradict Mr. Wilkins testimony in one finite instance, as far as the service rendered indicated on the accounting, which is an exhibit in the—the account provided by Ms. Smith for services rendered to the Wilkins and Bubbles, Inc. But I—I don't want to open that door at this point. I also don't think it's sufficiently relevant to have an impact one way or the other on the jury."

It is not a question of what the Court thinks, bur what the jury hears and decides

U.S. v. CABALLERO, *277 F.3d 1235* (10th Cir. 2002)

> In order to establish a due process violation, the Caballeros must show that (1) Avila's testimony was in fact false, (2) the prosecution knew it to be false, and (3) the testimony was material.

The Court and District Attorney both knew the testimony was in fact false, and that the testimony was material since it pertained to evidence admitted into the record.

VIII. **Eight Issue- Right of Appeal** -Judge Losses Authority to hear when appeal is filed. Whenever an appeal is filed to a superior court, the lower court looses jurisdiction to hear any thing except for the purpose of perfecting the appeal to this court and for the purpose of passing upon motions pending when the appeal is taken. The Court was duly notified of appeal of 11/16/02 for Richard Smith, and that it did not have jurisdiction to hear. A hearing was held on 11/20/02, and the issues appealed were heard

in the Court. Appellant's husband (Richard Smith) filed an appeal (23,600) on November 19, 2002, which he is entitled to due process. A hearing was held on November 20, 02 in the 11th Judicial District Court. Witnesses that testified were obtained from illegal subpoena, (RP 420- #2) the basis of said appeal. The Appellant filed Notice of appeal and Docketing Statement (RP 509) (23,725) on January 13, 2002. The 11th Judicial District Court has a hearing on January 14, 2002, which Appellant was not notified of, and asserted her rights to due process and the 11th Judicial District Court violated appellant's rights and issues a warrant for her arrest.

> STATE v. CLEMONS, *83, N.M. 674 (App. 1972)* 496 P.2d 167
>
> > "* * * the taking of an appeal from a judgment in a civil case completely divests the district court of jurisdiction except for the purpose of perfecting the appeal to this court and for the purpose of passing upon motions pending when the appeal is taken, or for the timely vacating of an order granting appeal.

Therefore the 11th Judicial District Court lost authority until a Memorandum Opinion was issued by the New Mexico Court of Appeals. The warrant should be dismissed.

IX. **Ninth Issue- Speedy Trial.** Actions prior to trial along with current acts have placed Appellant in irreparable harm; extraordinary hardship, costly delays, or unusual burdens of expense have resulted. Appellant asserted her rights to a Speedy Trial, (RP 75). State District Attorney filed for extension to try. Upon the review the Court will note that The Supreme Court granted an extension of time to try Appellant based upon the Petition filed by Sandra A Price, Assistant District Attorney. Price committed Deceit upon the Supreme Court when she informed the Court of the Facts why the extension was needed.

In the Supreme Court of the State of New Mexico

PETITION FOR EXTENSION OF TIME IN WHICH TO TRY DEFENDANT:

> (5) "This matter was set for trial and continued because the defense has been unable to interview an expert witness listed by the State. The Defendant had plans for vacation out of the Country and a trial setting in another Court. The earliest trial setting available is August 24, thru August 27, 1999, outside the extension granted through August 16, 1999.

July 1, 99 Court Transcript Pages 1-57 Verify that Charges were added to the Case from a Grand Jury Indictment which was dismissed in Case 98-899-6. The Transcript also verifies that

Appellants Attorney would be out of the Country **after** times ran, and had a Court setting **after** time ran. (Page 37 Line 12- Page 40 Line 25) The transcript also verifies that the reason that the Appellant's Attorney could not interview the witness for the State since the State did not give the Appellant and her Attorney the Evidence. (Page 27; Line 10-Page 36 Line 25) In Fact when the Attorney went by to see the evidence the State informed him he could not see the evidence (Page 32 Line 12-Page 33 Line 8).

> STATE v. MANZANARES, *121 N.M. 798* (1996) *918 P.2d 714*
>
> "The Sixth Amendment mandates that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. ..... In determining whether the right to speedy trial has been violated, a reviewing court must apply the four-factor balancing test from *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-92, 33 L.Ed.2d 101 (1972). The four factors of this test are the "(1) length of delay, (2) reasons for the delay, (3) assertion of the right, and (4) prejudice to the defendant." *Salandre,* 111 N.M. at 425, 806 P.2d at 565.

The delay was brought about the District Attorney and the failure to disclose evidence, even after the extension was granted the evidenced was withheld. The Right to a Speedy Trial was asserted by Appellant, The Appellant was prejudiced by the extension to

try. Nine months marks the minimum length of time that may be considered presumptively prejudicial, even for a case such as this involving simple charges and readily-available evidence.

X. **Tenth Issue- Evidence Withheld/ Disclosure by District Attorney, Rules of Criminal Procedure** –July 1, 99 Court Transcript Pages 1-57 Verify that Charges were added to the Case from a Grand Jury Indictment which was dismissed in Case 98-899-6. The Transcript also verifies that Appellants Attorney would be out of the Country **after** times ran, and had a Court setting **after** time ran. (Page 37 Line 12- Page 40 Line 25) The transcript also verifies that the reason that the Appellant's Attorney could not interview the witness for the State since the State did not give the Appellant and her Attorney the Evidence. (Page 27; Line 10-Page 36 Line 25) In Fact when the Attorney went by to see the evidence the State informed him he could not see the evidence (Page 32 Line 12-Page 33 Line 8). After Appellant is convicted, she finds out that Gilbert Lopez, who testified at the Grand Jury, but not allowed at trial; gave a report to State District Attorney and was the basis of his testimony at the Grand Jury. Appellant wrote to Insurance Fraud Division to obtain report and they could not locate, however, Mr. Lopez informed counsel it did exist. Counsel

filed motion for disclosure (RP 12) December 1998, and Bill of Particulars (RP 16). State does not comply with rules of discovery NMRA 5-501 July 99 Defense Counsel prior to trial and during Probation revocation both states on record they have not seen evidence. District Attorney has an obligation to disclose. Evidence is still not disclosed after extension to try is granted by Supreme Court.

NMRA 5-501:

A. Information subject to disclosure.

Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment, subject to Paragraph E of this rule, the state shall disclose or make available to the Appellant:

D. Certificate of compliance.

The prosecutor shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgement of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the prosecutor to the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the defendant.

The record will reflect that this was not done by the District Attorney, violating due process. When the Court was advised of the evidence not being released and the actions of the District Attorney, the 11th Judicial Court did nothing.

BRADY *v.* MARYLAND, *373 U.S. 83* (1963)

> Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

UNITED STATES v. AGURS, 427 U.S. 97 (1976)

> a prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the Appellant's right to a fair trial.

XI. **Eleventh Issue- Deceit/Perjury of District Attorney (Prosecutorial Misconduct)** before, during trial and in post conviction proceedings. In the hearing of November 13, 01, Judge William Birdsall is informed of the perjury as well as illegal search and seizure of bank records by District Attorney, now Chief Deputy Assistant District Attorney Sandra A Price

November 13, 2001 Page 5, Line 15-25

Ms. Smith: "there has been a subpoena served illegally. It's an illegal search and seizure. I have made a motion. I would like a ruling that those documents be turned back to us and that they not be allowed. The District Attorney did this will intent and we were never notified.
The Court: " what are you talking about, ma'am?"
Ms. Smith: " The Assistant District Attorney, if you look in my paperwork that was filed this morning, if you Honor has it. If not I do have a copy. It's a motion to Quash Subpoena Duces Tecum, and forgive me if I say it incorrectly because I'm not an attorney.

Page 6, Line 1-4

The Court:- " that's why I want to get you one, so that the attorney can help you make sense of this, ma'am"
Ms Smith: "Yes, Your Honor."

Page 7, Line 21-25

Ms. Smith: " I'm sorry to interrupt, but there is one thing, and I do need this on the record. Any communication that is to be given shall be given in the form prescribed by rules of law. The District Attorney has not applied or given me any documents except one, and it

Page 8, Line 1-

Was faxed to me, which indicates they do have my fax number. I think we need to play on a level ground likes the law says we're supposed to."
The Court: "That's right. You both need to serve each other with anything that you file with the Court."
Ms. Smith: "And the Chief District Attorney has not done that thus far."

Ms. Price: "Your Honor, I did not have her address until I got the letter from –"
The Court: " Okay, Okay, Okay"
Ms. Smith: " Your Honor-"
The Court: "we know that we're got the address now"
Ms. Price: "I have the fax number. Right."
Ms. Smith: "Your Honor, I beg to differ. She received a fax prior to my motion. She has had it from day one. She has just lied to the Court and I want it in the court record. This is not going in the way it is supposed to. She had the fax number and address since she filed the revocation. She got the it from my parole officer; Your Honor She just lied to you."
The Court: Okay, Well, we'll deal with that at some other date. Maybe on the 26th when we see if you've got a lawyer

The perjury is brought to the attention of the Court; The Honorable William C Birdsall does nothing. The issue is not referred. Judge William C Birdsall does not uphold the Judiciary Code of Conduct.

21-300. A judge shall perform the duties of office impartially and diligently

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

The District Attorney, Sandra A Price, says she did not have the address to serve a subpoena she issued. On October 30, 2001. When in fact she had the address on September 28, 2001 to issue a summons to appear (RP 330) The same District Attorney withholds evidence prior to trial, as well as her State investigative report (Gilbert Lopez); files a Second Grand Jury Indictment as well as 6 misdemeanor charges from the same continuing act, placing Appellant in double jeopardy; commits deceit upon the New Mexico Supreme Court when asking for an extension to try; Initiated a probation revocation without due process; Interfering in parole and probation supervision; Not assisting the Arizona Parole & Probation's Office/ Interstate Compact with an order of probation, instead filling for a revocation; Contacting Appellants employers telling them of conviction- action to get Petitioner in a position wherein she could not pay restitution- result would be revocation of probation.; and Filed Revocation of Probation without referral from the Court, NM Adult Parole & Probation, or AZ Adult Parole & Probation, violating Federal Interstate Compact Law 4 U.S.C. § 112 which allows Interstate Compacts, and State of New Mexico (N.M.S.A. 31-5-20) and State of Arizona (A.R.S.31-467). Federal Law mandates that the District Attorney

comply with Arizona's requests. Instead of doing as Arizona requests, District Attorney files motion to revoke probation. Then violates Federal Interstate Compact law trying to enforce conditions, which Arizona addressed and parole said would not be enforced. District Attorney has filed three MOTIONS TO REVOKE over 16-month period, requiring appellate to return 10 times for hearings. The motions are not based upon any requirements such as an independent party, timely hearing, and a written report of fact presented to applicant, pursuant to law. The same District Attorney states that no one can override the 11th Judicial District Court. The same District Attorney that stated the Misdemeanor conviction had been dismissed; however there was no Order or Amended Judgment & Sentence filed in the 11th Judicial District Court. The same District Attorney that issued numerous Subpoena's to various parties including but not limited to Employers, Landlords, Banks, & Telephone without due process and service on all parties, (deceit and fraud) RICO ACT30-42-1 to 30-42-6 § Racketeering Act (Rico), before during, and after trial. One would wonder if this isn't prosecutorial misconduct or maybe vindictiveness, after all this District Attorney has more than 12 years experience, and was at one time the District

Attorney, an elected official from 1996-2000. The same District Attorney that allowed States Witness to call Defense Witness and tell him to change his story, The same District Attorney who did not issue a target notice prior to the Grand Jury of November 6, 1998, which the record will reflect, Excessive Bail $50,000 bail for embezzlement / fraud of $7,900.00. Property owned & adequate assets were present. (RP 101) The same District Attorney evaded its discovery obligation and in engaged in a pattern of evasion, deceit, perjury and willful persecution. The United States Constitution and the New Mexico State Constitution mandates that the action pending be dismissed, and that charges be referred against the District Attorney, for violating the Attorney's Code of Conduct as well as Appellant's Civil Rights.

XII. **Twelfth Issue- Abuse of Discretion** -An abuse of discretion occurs when a judicial determination is arbitrary, capricious or whimsical. It is not merely an error of law or judgment, but an overriding of the law by the exercise of manifestly unreasonable judgment or the result of impartiality, prejudice, bias or ill-will as shown by evidence or the record of proceedings. The Honorable William C Birdsall shows this when

he is informed of the Perjury of the Chief Deputy Assistant District Attorney, when he is apprised that Arizona could change Parole/Probation conditions that this is Federal Law, that Due Process is required for a Probation Revocation, of the illegal search and seizure by Chief Deputy Assistant District Attorney, and not hearing any motions filed by appellant. The 11TH Judicial District Court then has hearing for January 14, 2003 which the appellant is not notified of, although she has been at 10 hearings over the course of 16 months, and paid her restitution that is in the order of probation, and when Appellant is not notified issues a warrant for her arrest, but has never heard any motions filed by Appellant. The Appellant filed a Motion for Dismissal (RP 385) on November 13, 2001. The Honorable William C Birdsall denies the Motion to Dismiss (RP 426) on March 6, 2002, but Appellant is not notified. The Order does not comply with due process (NMRA LR11-103 (C)).

XIII. **Thirteenth Issue- Order of Probation/Promissory Note- Due Process for Ability to Pay, Signing Promissory Note, Telling Employer of Conviction.** Order of Probation received by Defendant is incorrect, however Defendant was informed to sign them, and they would be corrected. Restitution was not determined

as to what the Defendant could afford to pay, and of course the Promissory Note is turning a criminal conviction into a civil Judgment. The Judgment and Sentence does not say as a condition of probation with specificity of telling and employer of said conviction nor does it say as a condition of probation that the promissory note must be signed, or as a condition of the suspended sentence. (RP 41) Appellant's current employment was did not involve insurance which is the type of work in which the conviction occurred. Order of Probation also places Defendant in Double Jeopardy (Collateral Estoppels) which the Court of Appeals issued Opinion Memorandum. (RP 309)

STATE v. MARTINEZ, 84 N.M 295 (App. 1972) 502 P.2d 320.

> "If the deferred sentence does not set out the conditions of probation, there are no conditions to be violated". State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968)

U.S. v. DIAMOND, 969 F.2d 961 (10th Cir. 1992):

> "Although a restitution order is characteristically similar to a civil judgment in that it compensates a victim for losses and remains enforceable at civil law, the court cannot convert a criminal sentence into a civil judgment. United States v. Snider, 957 F.2d 703, 707 (9th Cir. 1992) (quoting United States v. Ciambrone, 602 F. Supp. 563, 568 (S.D.N.Y. 1984)). Where a court orders restitution under the VWPA, it "may not require the defendant to execute a consent judgment or otherwise require him to

secure payment `during and after the period of probation.'" United States v. Joseph, 914 F.2d 780, 786 (6th Cir. 1990). Although a court may require a defendant to make restitution under the VWPA "within a specified period or in specified installments," 18 U.S.C. § 3663(f) (1) (1988), the duration of such period or the last such installment "shall not be later than- (A) the end of the period of probation, if probation is ordered." Id. at § 3663(f) (2) (A)."

DOE V FAUVER, 3F.SUPP.2D 485 (D.N.J 1997)

Parolee was entitled to preliminary injunction to prevent State Parole Board from informing his employer of his status as a parolee and the nature of his crime, given the likelihood of success on the merits on parolee's claim that employer notification infringed upon his liberty interests in violation of the due process clause of the fourteenth Amendment.

The Order of Probation should be dismissed, due to the erroneous nature of the document as well as violating due process and Constitutional Rights of the Appellant.

5. List of Authorities

1) **First Issue–Double Jeopardy** U.S. Constitution, Article V & XIV, and State of New Mexico Constitution, Article II, §15, N.M.S.A. 31-1-10 Double Jeopardy , No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment.

STATE v. APODACA, 123 N.M. 372 (App. 1997) *940 P.2d 478* Article VI, Section 2 speaks of the right to *one* appeal, more than one appeal may be necessary in a single case to serve the purpose of the constitutional provision

STATE V. TIJERINA, 86 N.M. 31, 519 P.2D 127, 129, 130 (1973) It should not be inferred from this opinion that this Court intends to encourage or approve piecemeal prosecution. Such disorderly criminal procedures involve a myriad of problems which threaten the existence of our judicial system. The risk of prejudice to the accused, and the waste of time inherent in multiple trials, both perpetuate delays in the judicial process and unconscionable expenditures of public funds, all of which could be avoided by prosecutors getting their facts straight, their theories clearly in mind and trying all charges together.

EX PARTE NIELSEN, 131 U.S. 176 it will be observed that all these instances are supposed cases of acquittal; and in order that an acquittal may be a bar to a subsequent indictment for the lesser crime, it would seem to be essential that a conviction of such crime might have been had under the indictment for the greater. If a conviction might have been had, and was not, there was an implied acquittal.

STATE v. QUINTANA, *69 N.M. 51* (1961)*364 P.2d 120* However, if the several offenses are the same, as where they arise out of the same transaction, and were committed at the same time, and were part of a continuous criminal act, and inspired by the same criminal intent, which is an essential element of each offense, they are susceptible of only one punishment.

2) **Second Issue – Illegal Search & Seizures, Motions & Orders** United States Constitution Amendment IV. Illegal Search & Seizures N.M. Constitution Article II, §10, NMSA 1978 §14-7-1, (A) Requiring notice of intent to gain access to records of financial institutions, §§ 30-42-1 to 30-42-6 § Racketeering Act (Rico) and NMRA §5-103 Service and filing of pleadings and other papers, 18 U.S.C. §§ 1961-68 (1994) RICO ACT.

STATE V. MARQUART, *123 N.M. 809* (App. 1997) *945 P.2d 1027* The Defendant has the same rights and expectations that other parties do with respects to an illegal search and seizure the exclusionary rule does apply in probation hearings.

STATE v. GUTIERREZ, 116 N.M. 431(1993) *863 P.2d 1052* New Mexico constitutional prohibition against unreasonable searches and seizures requires that we deny the state the use of evidence obtained in violation of Article II, Section 10 in a criminal proceeding.

WONG SUN V. UNITED STATES, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." STATE V. WILSON, *92 N.M. 54* (1978) *582 P.2d 826* "[T] he rational behind the exclusionary rule is that evidence obtained in violation of *Constitutional rights* must be suppressed"; The rights given an individual by a statute may be an enlargement of the constitutional guarantees A right afforded an individual by the legislature is nonetheless a right whether it is an enlargement of a constitutional or a legislative right

STATE v. EDER, *103 N.M. 211* (App. 1985) *704 P.2d 465* The American Bar Association's Standards also state that "[i]t is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena * * *." 1 ABA, Standards for Criminal Justice, The Prosecution Function, 3-3.1(d) (2d ed. 1980). The use of a subpoena or a document that looks like a subpoena for conducting pretrial interviews is unauthorized, improper, and a usurpation of judicial power. Keen. See also Durbin

v. United States, 221 F.2d 520 (D.C.Cir. 1954). The same reasoning applies to compelling witnesses to produce documents with unauthorized subpoenas. The practice has been deemed coercive and intimidating. To the extent that an unknowing witness may feel compelled to attend or produce documents, the practice amounts to perpetrating a deceit on the witness. NMSA 1978, Code of Prof.Resp. Rule 1-102(A)(4) (Repl. Pamp. 1982) defines misconduct as including engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation.

MONTANO v. ENCINIAS, 103 N.M. 515 (1985) 709 P.2d 1024 "In any event, we direct that judgments or orders in New Mexico shall not be entered in the court record in anonymity. If such a document does not indicate by counsel's signatures that all parties affected have seen it before it is presented for the judge's signature, the judge shall be satisfied by proof of service that notice of presentation has been given to attorneys for all parties."

3) **Third Issue – Due Process Probation Revocation.** United States Constitution Amendment V & XIV N.M. Constitution Article II § 14, 18, Due process right N.M.S.A. *31-21-15* the court may issue a notice to appear to answer a charge of violation. The notice shall be personally served upon the probationer.

GAGNON v. SCARPELLI, 411 U.S. 778 (1973), Due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in Morrissey v. Brewer, 408 U.S. 471, in the case of a parolee.

MORRISSEY v. BREWER, 408 U.S. 471 (1972)"At the revocation hearing, which must be conducted reasonably soon after the parolee's arrest, minimum due process requirements are: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses

(unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole

STATE v. CHAVEZ, 94 N.M. 102 (1979) 607 P.2d 640 Authorities have been cited by defendant and the State which have held delays of days and months reasonable and unreasonable, but none have statutes or rules which state a time period such as "The hearing shall then take place." The rule is prevalent that a revocation hearing will satisfy due process if the hearing is held promptly or within a reasonably short period of time after an alleged violation or after an arrest for a violation. We unhesitatingly hold that seven months delay after arrest is unreasonable. Procedural due process was denied defendant

STATE v. RUTH ANNE E., 1999-NMCA-035, 126 N.M. 670 974 P.2d 164 When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decision maker

STATE, EX REL HUMAN SERVICES DEPT, Gomez, 99 N.M. 261 (1983) 657 P.2d 117 Specifically, the court held that Gomez was deprived of due process because his AFDC termination hearing was conducted by telephone and not in the presence of a hearing officer who could observe his demeanor.

STATE v. SANCHEZ, 2001-NMCA-060, 130 N.M. 602 28 P.3d 1143, Those rights include written notice of the

violation, disclosure of evidence against the defendant, and, most pertinent to this case; the right to confront and cross-examine adverse witnesses.

STATE v. MARTINEZ, 84 N.M 295 (App. 1972) 502 P.2d 320. If the deferred sentence does not set out the conditions of probation, there are no conditions to be violated. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968

4) **Fourth Issue - Due Process Interstate Compact Federal Law of Interstate Compact for Adult Offender Supervision Federal Law.** 4 U.S.C. § 112 allows Interstate Compacts, and State of New Mexico (N.M.S.A. 31-5-20) and State of Arizona (A.R.S.31-467) are parties to the Federal Interstate Compact and the U.S.C. A. 14th Amendment (Due Process). Jurisdiction is therefore Federal Court not State District Court. United States Constitution Amendment V & XIV N.M. Constitution Article II § 14, 18, Due process right

CAMERON v. MILLS, (S.D.Iowa 1986) *645 F. Supp. 1119* Within this area, apparently, a compact that does not receive congressional consent will not be invalidated for lack of consent, but a compact that is consented to by Congress will thereby become federal law.... Thus, the final stage in this analysis is whether Congress has already consented to the compact between Iowa and Kansas. This Court believes that it has. In 4 U.S.C. § 112(a), Congress provided:

> The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements in compacts.

Examination of this statute's legislation history demonstrates that Congress also intended this statute as approval for interstate corrections compacts.

STATE V. GARDNER, 95, N.M.171 (App. 1980) 619 P.2d 847 A New Mexico court has the duty to enforce an agency regulation when compliance with the regulation is mandated by the federal or state Constitutions or state law.

5) **Fifth Issue-Appointment of Counsel.** United States Constitution Amendment VI & XIV, N.M. Constitution Article II § 14,18

STATE v. RAMIREZ, 89 N.M. 635 *(1976)* 556 P.2d 43 The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." "This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." *Johnson v. Zerbst,* supra [304 U.S. at 462, 58 S.Ct.at 1022, 82 L.Ed. at 1465].

STATE EX REL. QUINTANA v. SCHNEDAR, 115 N.M. 573 (1993), *855 P.2d 562,*The inherent power of the judiciary to appoint counsel for indigent defendants is within the unique province of the courts to ensure the constitutionality of criminal prosecutions

6) **Sixth Issue -Right to be Heard & Notification of Hearings** United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18

NMRA LR 11-101 (B) Setting of the trial and hearings

B. "All settings made by the court shall be binding upon **all parties** and attorneys properly noticed. No setting shall be vacated except upon good cause shown by written motion."

NMRA LR11-103 (C) Submission of orders, judgments, briefs, and findings

C. "Orders, decrees, and judgments shall not be submitted to the court for signature unless they have been initialed by all attorneys of record or unless the attorney submitting same certifies to the court that opposing counsel has, after five (5) days of receiving the order, decree, or judgment, failed or refused to initial same."

STATE v. VEGA, *91 N.M. 22* (1977) *569 P.2d 948 as refers to: Powell* v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84A.L.R. 527 (1932) states: "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

7) **Seventh Issue – Perjured Testimony & Right to Confrontation of witness** United States Constitution Amendment V & XIV, N.M. Constitution Article II § § 14, 15, 18 Right Against Double Jeopardy and Right to confront Witnesses against him

U.S. v. CABALLERO, 277, F.3d 1235 (10th Cir. 2002) In order to establish a due process violation, the Caballeros must show that (1) Avila's testimony was in fact false, (2) the prosecution knew it to be false, and (3) the testimony was material. Because the Caballeros failed to make contemporaneous objections at the time of Avila's testimony, we review this particular claim of prosecutorial misconduct for plain error. United States v. Gonzalez-Montoya, 161 F.3d 643, 650

STATE v. KINCHELOE, 87 N.M. 34 (1974) *528 P.2d 893,* "[A] buse of discretion" . . . implies not only an erroneous conclusion but that such conclusion was brought about by temper, humor, caprice, passion, prejudice, perversity of will, discrimination, or partiality. Certainly the exercise of honest judgment based upon facts and

conditions carefully considered and innately reasonable cannot be said to constitute an abuse of discretion.

IMBLER v. PACHTMAN, 500 F.2d 1301 (9th Cir. 1974) In 1969 the United States District Court, concluding that Imbler's conviction was secured in part by testimony the prosecution knew, or had strong reason to know, was perjured, granted him a writ of habeas corpus

MOONEY *v.* HOLOHAN, *294 U.S. 103* (1935) A criminal conviction procured by the state prosecuting authorities solely by the use of perjured testimony known by them to be perjured and knowingly used by them in order to procure the conviction, is without due process of law and in violation of the Fourteenth Amendment.

8) **Eight Issue – Right of Appeal** United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18

STATE v. CLEMONS, 83, N.M. 674 (App. 1972) *496 P.2d 167* "* * * the taking of an appeal from a judgment in a civil case completely divests the district court of jurisdiction except for the purpose of perfecting the appeal to this court and for the purpose of passing upon motions pending when the appeal is taken, or for the timely vacating of an order granting appeal.

STATE v. WHITE, 71, N.M. 342 (1962) *378 P.2d 379,* "The procedure on appeals and writs of error in criminal cases shall be governed by the procedure on appeals and writs of error in civil cases except as otherwise specified by law or rule of the Supreme Court."

9) **Ninth Issue – Speedy Trial** United States Constitution Amendment VI & XIV N.M. Constitution Article II § 14,18

SALANDRE V. STATE, 111 N.M. 422 (1991), 806 P.2d 562, Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective

defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. . .. So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

STATE v. MANZANARES, *121 N.M. 798* (1996) *918 P.2d 714* "The Sixth Amendment mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. ..... In determining whether the right to speedy trial has been violated, a reviewing court must apply the four-factor balancing test from *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 2191-92, 33 L.Ed.2d 101 (1972). The four factors of this test are the "(1) length of delay, (2) reasons for the delay, (3) assertion of the right, and (4) prejudice to the defendant." *Salandre,* 111 N.M. at 425, 806 P.2d at 565.

10) Tenth Issue – Evidence Withheld/ Disclosure by District Attorney Rules of Criminal Procedure
United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18 NMRA 5-501: A) Information subject to disclosure., D) Certificate of compliance.

BRADY *v.* MARYLAND, *373 U.S. 83* (1963)
Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment,

irrespective of the good faith or bad faith of the prosecution.

UNITED STATES *v.* AGURS, *427 U.S. 97* (1976) a prosecutor does not violate the constitutional duty of disclosure unless his omission is sufficiently significant to result in the denial of the defendant's right to a fair trial.

STATE v. DeBORDE, 121 N.M. 601 (App. 1996)*915 P.2d 906*

AVAILABILITY OF DISCOVERY AT PROBATION REVOCATION HEARINGSUNDER NEW MEXICO'S DISCOVERY RULES

"The procedural rule governing discovery in criminal proceedings requires the State to disclose "a written list . . . of all witnesses which the prosecutor intends to call at the trial, together with any statement made by the witness." SCRA 1986, 5-501(A)(5) (Repl. 1992)."

MATHIS v. STATE, *112 N.M. 744* (1991)*819 P.2d 1302* Dismissal is appropriate if the defendant can show he will be deprived of a fair trial if he is tried without the missing evidence. *Bartlett,* 109 N.M. at 681, 789 P.2d at 629.

11) **Eleventh Issue- Deceit/ Perjury of District Attorney** N.M.S.A. 36-2-10: [Duties of attorneys.] D. "To employ for the purpose of maintaining causes confided to him such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18

STATE v. LUCERO, 1999-NMCA-102, *127 N.M. 672, 986 P.2d 468* The Supreme Court said that while there may not always be an intent to provoke a mistrial, the prosecutor's misconduct may be so egregious that double jeopardy protections must attach…The first question is whether the prosecutor's conduct was so unfairly prejudicial to the defendant that it could not be cured by

means short of a mistrial or a motion for a new trial. Breit, 1996-NMSC-067, ¶ 32. We cannot say that in this case the prosecutor's failure to disclose the existence of a second statement was so unfairly prejudicial to Defendants that it could not be cured by means short of a mistrial or a motion for a new trial. The second statement revealed the name of another witness, Medrano, who allegedly purchased clothing from Allison. Defendants assert that this was inconsistent with Allison's earlier statement that the only person he gave merchandise to was Lucero"

MATTER OF RICHARDS, *123 N.M. 579* (1997) *943 P.2d 1032*"In a previous disciplinary matter, a lawyer was publicly censured for knowingly making false statements of material fact to a tribunal. *In re Chakeres,* 101 N.M. 684, 687 P.2d 741 (1984). In a brief filed in the Court of Appeals, Chakeres stated that the testimony concerning a particular issue was uncontroverted. In fact, as Chakeres admitted to the hearing committee, the testimony on that issue was inconsistent and his statement was inaccurate. Although respondent, like Chakeres, is receiving a public censure, there is a significant difference between the two cases. Chakeres admitted his wrongdoing; respondent has not."

MATTER OF McCULLOCH, *103 N.M. 542* (1985) *710 P.2d 736* "When he acts to subvert the very system he has pledged to serve, it is obvious that he should no longer be allowed to practice law. This would be true even absent a criminal conviction."

MATTER OF DUFFY, *102 N.M. 524* (1985) *697 P.2d 943* "[W] henever an attorney is found to have engaged in intentional conduct involving dishonesty * * * there is a strong indication that a person is unfit for membership in the Bar of this State. A lawyer's license to practice is a representation that the holder is one who can be trusted to act with honesty and integrity."

MATTER OF LINDSAY, *112 N.M. 17* (1991) *810 P.2d 1237*"Ordinarily when an attorney licensed by this Court

engages in intentional misconduct involving dishonesty, he or she has been disbarred. *See, e.g., In re Hartley,* 107 N.M. 376, 758 P.2d 790(1988); *In re McCulloch,* 103 N.M. 542, 710 P.2d 736 (1985); *In re Ayala,* 102 N.M. 214, 693 P.2d 580 (1984); *In re Ortega,* 101 N.M.719, 688 P.2d 329 (1984). In addition to providing a strong deterrent to similar misconduct by other attorneys in this state, greater discipline than that previously recommended in this case will promote more uniform standards for the imposition of sanctions."

STATE v. GONZALES, 2002-NMCA-071, *49 P.3d 681* "Moreover, because the misconduct at issue did not happen in the context of trial, but rather required a separate review of events that occurred outside the courtroom, and because the misconduct is egregious in nature and implicates due process considerations, de novo review is appropriate. A showing of prosecutorial misconduct that the court described as rising into the realm of perjury or attempts to mislead this court"

STATE v. ABBATI, *99 N.J. 418* (1985) *493 A.2d 513* It is, of course, true that a trial court must dismiss an indictment if prosecution would violate the defendant's constitutional rights. *See, e.g., Barker v. Wingo,* 407 U.S. 514, 92 *S.Ct.* 2182, 33 *L.Ed.*2d 101 (1972); *State v. Szima,70 N.J. 196, cert.* den., 429 U.S. 896, 97 *S.Ct.* 259, 50 *L.Ed.*2d 180 (1976) (right to speedy trial); *State v. Barnes,84 N.J. 362* (1980) (freedom from double jeopardy); *State v.Sutton, 80 N.J. 110* (1979) (freedom from selective prosecution); *State v. Jones, 183 N.J. Super. 172* (App. Div. 198 2) (right to due process). The double jeopardy clauses of the federal and state Constitutions however do not prohibit retrial of a defendant when a prior prosecution for the same offense has ended in mistrial attributable to the inability of the jury to agree on a verdict.

STATE v. BREIT, 1996-NMSC-067, 122 N.M. 655 930 P.2d 792 In New Mexico, under the standard we adopted in *State v. Day,* 94 N.M. at 757, 617 P.2d at 146, the

double-jeopardy bar to retrial is not triggered unless "the prosecutor engaged in any misconduct for the purpose of precipitating a motion for a mistrial, gaining a better chance for conviction upon retrial, or subjecting the defendant to the harassment and inconvenience of successive trials."

12) **Twelfth Issue -- Abuse of Discretion United States Constitution** Amendment V & XIV N.M. Constitution Article II § 14,18

13) **Thirteenth Issue –Order of Probation/Promissory Note** United States Constitution Amendment V & XIV N.M. Constitution Article II § 14,18

STATE v. MARTINEZ, 84 N.M 295 (App. 1972) 502 P.2d 320. If the deferred sentence does not set out the conditions of probation, there are no conditions to be violated. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968

U.S. v. DIAMOND, 969 F.2d 961 *(10th Cir. 1992):*"Although a restitution order is characteristically similar to a civil judgment in that it compensates a victim for losses and remains enforceable at civil law, the court cannot convert a criminal sentence into a civil judgment. United States v. Snider, 957 F.2d 703, 707 (9th Cir. 1992) (quoting United States v. Ciambrone, 602 F. Supp. 563, 568 (S.D.N.Y. 1984)). Where a court orders restitution under the VWPA, it "may not require the defendant to execute a consent judgment or otherwise require him to secure payment `during and after the period of probation.'" United States v. Joseph, 914 F.2d 780, 786 (6th Cir. 1990). Although a court may require a defendant to make restitution under the VWPA "within a specified period or in specified installments," 18 U.S.C. § 3663(f) (1) (1988), the duration of such period or the last such installment "shall not be later than- (A) the end of the period of probation, if probation is ordered." Id. at § 3663(f) (2) (A)."

STATE v. CARRASCO, 124 N.M. 320 (App. 1997) 950 P.2d 293, it is mandatory that the actual determination of Defendant's ability to pay be made by the court

Doe v. Fauver, 3F.SUPP.2D 485 (D.N.J 1997) Parolee was entitled to preliminary injunction to prevent State Parole Board from informing his employer of his status as a parolee and the nature of his crime, given the likelihood of success on the merits on parolee's claim that employer notification infringed upon his liberty interests in violation of the due process clause of the fourteenth Amendment.

Standard of Review

The appellate courts are not bound by conclusions of law reached by the trial court and the applicable standard of review for issues of law is de novo. (Gallegos v. State, 123 N.M. 362, 940 P.2d 468 (Ct. Appd. 1997)

6. Record

The Entire proceedings were electronically recorded.

Appellant has transcription of all proceeding.

7. Prior or Related Appeals

There are two prior appeals in this case. Appellate filed a prior Direct Appeal Case No. 21, 129. A decision and mandate has been issued in that matter and is in the basis of this appeal. Appellants Spouse, Richard Smith filed appeal 23,600, mandate has been issued.

PRO SE AND LAYMAN AT LAW

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I hereby certify that a true and correct copy of the foregoing

AMENDED DOCKETING STATEMENT were Faxed/Mailed

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On March 26, 2003.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

STATE OF NEW MEXICO)
)
Plaintiff/Appellee)
)
vs.)
)
CHERI SMITH)
)
Defendant/Appellant)
)

Case No. CR 98-935-4
Court of Appeals Case 23, 725

MOTION FOR REHEARING

COMES NOW Cheri Smith, appearing pro se, pursuant to Rule 12-404, N. M. R. A. 2003, hereby submits this motion for rehearing of the Court of Appeals Memorandum Opinion filed on July 03, 2003. The Motion for Rehearing is timely if filed on or before July 18, 2003.

This Court s Memorandum Opinion proposes to dismiss the Appeal for lack of a final order. This Court's decision is 1) in conflict with a decision by the Supreme Court, 2) involves a significant question of law under the State of New Mexico

Appendix S

Constitution and the United States Constitution, 3) involves an issue of substantial public interest.

The Issues in question are 1) Due Process guaranteed under the United States Constitution XIV Amendment, and State of New Mexico Article II §18; 2) Interstate Compact 31-5-20 N.M.S.A. 2003; 3) Double Jeopardy 30-1-10 NMSA 2003; 4) Illegal Search & Seizure N.M. Constitution Article II §10; and 5) Appointment of Counsel., United States Constitution Amendment VI & XIV, N.M. Constitution Article II § 14, §18.

Issue One This Court proposes to dismiss the Appeal since the "Appeal does not attach any copies of the orders appealed from See Rule 12-202(B) NMRA 2003 RP509". This rule does not address attaching copies of motions that have not been heard only orders and judgments. This Court proposes to dismiss for lack of a final order. State v Morris 69 N.M. 89, 364 P.2d 348 states: "In absence of an **express statue or rule,** no appeal will lie from anything other than a formal written order or judgment signed by the judge and filed in the case or entered upon the records of the court and signed by the thereof." The Express Rule and Statue are

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found in Interstate Compact 31-5-20 ARTICLE VIII (A) N.M.S.A. 2003, and in Double Jeopardy 30-1-10 NMSA 2003. Therefore Due Process mandates that this appeal be heard. This Court has also been informed that the Record Proper is not complete and Appellant filed a Motion for Due Process to District Court, which has been ignored and this Court could order the record to be supplemented. See Rule 12-209 (C). The Appellant previously filed a Writ of Mandamus with the State of New Mexico Supreme Court which was denied, and Appellant asserted her rights to the United States District Court (RP 547-551) which was denied and has been appealed to the United States District Court for the Tenth Circuit. The record thus must be supplemented.

Issue Two The State of New Mexico passed the Interstate Compact Statue 31-5-20 N.M.S.A. 2003; signed into law April 5, 2001 and has since passed 46 states making the statue law. The rules and regulations that are in force remain since the first meeting of the interstate compact commission was held November 18, 2002 See Interstate Compact 31-5-20, Article VIII (A) N.M.S.A. 2003. The September 28, 2001 Motion to Revoke was

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filed by the State District Attorney violating Due Process, and State Statues. STATE v. DOE, *104 N.M. 107* (App. 1986) *717 P.2d 83;* GAGNON v. SCARPELLI, 411 U.S. 778 (1973); MORRISSEY v. BREWER, 408 U.S. 471 (1972). The Appellant paroled directly to Arizona, and probation was also transferred. (RP 400) The Appellant has lived in Arizona since February 7, 2001. The 11th Judicial District Court and the District Attorney does not have subject matter jurisdiction. Lasley v Baca, 95 N.M. 791 (1981), 626 P.2d 1288 which states "Attack on subject matter jurisdiction may be made at any time in proceedings, including for the first time on appeal". Trujillo v. Serrano, 117 N.M. 273, 871 P.2d 369, (N.M. 1994) which states: "Lack of subject matter jurisdiction precludes possibility of hearing case. The State of New Mexico lacks Jurisdiction State of New Mexico Interstate Compact 31-5-20, ARTICLE VIII, (A) N.M.S.A. 2003. See The New Mexico Correction Department Policy CD 053001, Adult Interstate Compact. The District Court lacks jurisdiction to hear, Due Process and Interstate Compact Statues.

Issue Three Double Jeopardy 30-1-10 NMSA 2003 can be raised at any time. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189,

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25 L.Ed.2d 469 (1970); State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973); State v. Maestas, 87 N.M. 6 *(1974)* 528 P.2d 650 528 P.2d 650. Appellant raises the issue since This Court Ordered a Conviction to be removed, and the District Court being fully advised both by this Court by a Memorandum Opinion in November 2000 and by Appellant in a hearing on November 13, 2001 chose to add the conviction to an Order of Probation signed by the Court on November 15, 2001. Thus Double Jeopardy has been placed upon Appellant. As well as a second issue of Double Jeopardy previously raised.

Issue Four Illegal Search & Seizure N.M. Constitution Article II §10, State v. Marquart, 123 N.M. 809 (App 1997) 945 P.2d 1027; The District Attorney obtained the documents illegally, without Due Process , no subpoena was served on Appellant. The Supreme Court has ruled that The filing in United States District Court for the District of New Mexico is therefore within the Civil Rights afforded Appellant. The State District Attorney has violated State Statue, Illegal Search & Seizure, Due Process of the Constitution of the State of New Mexico, and the Constitution of

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The United States. The Appeal to this Court is also within State Statue and should be heard.

The Appellant also addressed in the Docketing Statement Double Jeopardy, which can be appealed at any time. 31-5-20 N.M.S.A. 2003 states:

> No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted.

There are two cases of Double Jeopardy that apply in Appellant's case. This Court stated "It is clear from the record summarized in detail above, that the case before us, at this time, does not concern the underlying judgment and sentence which Defendant already appealed to this Court and which resulted in a Memorandum Opinion affirming her convictions in part and reversing in part. Rather the case before us at this time concerns whether Defendant has violated the terms and conditions of her probation." The Court is correct in part, however, the Docketing Statement and the record proper states the Double Jeopardy in detail. This Court issued a

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Memorandum Opinion on November 20, 2000, which was not complied with as of November 13, 2001. When Appellant addresses the issue to the 11th Judicial District Court the State on November 13, 2001, the 11th Judicial District Court and State commit perjury, stating the conviction had been dismissed, when in fact there is no Order or an Amended Judgment & Sentence filed. The Court signs an Order of Probation (RP 405-408), which includes the conviction that this Court reversed in its Memorandum Opinion of November 20, 2000. The Order of Probation is signed on November 15, 2001, violating the Memorandum Opinion, and keeping the Appellant in Double Jeopardy. The Memorandum Opinion has still not been complied with and the Appellant is placed in Double Jeopardy, which can be appealed at any time. Collateral Estoppel applies since this Court issued Memorandum Opinion Ct. App. No. 21,129 reversing and the 11th Judicial District Court has had 2 years and 7 months to comply.

The Appellant was also placed in Double Jeopardy when the State of New Mexico District Attorney added charges from Case 98-899-6. The case was dismissed for 5-604, NMRA 1999 on June

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23, 1999 (RP 114). The District Attorney brings a second grand jury indictment on November 6, 1998 (RP1-RP 3) for additional charges from the same continuing act, as well as adding 6 misdemeanor charges on June 25, 1999 (RP 94-RP 95), from the Grand Jury Indictment in Case 98-899-6, which was dismissed as a result 5-604, not by the State. 11th Judicial District Court is informed (RP 103-RP 104) that it is double jeopardy and a violation of U.S. Constitution, Article V, and State of New Mexico Constitution, Article II, Section 15 (RP 103 –#1). Appellant's Counsel submitted there could be only one prosecution for a continuing crime. (RP 104 -#4) The Tape which was used in the search warrant in case 98-899-6 was introduced at the Trial in CR 98-935-1 (RP32-66). The State was allowed to introduce the tape as evidence of the actions of Appellant. If the tape was used and needed by the State then the only conclusion is that it is the same continuing act, with the same parties. In case 98-899-6 Appellant was indicted by the Grand Jury on October 23, 1998 on seven counts including fraud, or in the alternative embezzlement, charges of forgery, perjury, insurance code felonies and misdemeanors. (RP 114). In case 98-935-1 Appellant was indicted by the Grand

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Jury on November 6, 1998 Count 1 Fraud or in the Alternative Embezzlement and Count 2, Fraud or in the Alternative Embezzlement (RP 1-RP 2). STATE v. MAESTAS, 87 N.M. 6 (1974) 528 P.2d 650, states: "If the defendant had unlawfully possessed 42 controlled substances under Schedule I (A), § 54-11-16, supra, the prosecution cannot split up into 42 charges what was in fact one act and offense. The theft of several articles at the same time constitutes

but one offense although such articles belong to several different owners. Where a person is in unlawful possession of stolen property, stolen from two different owners at different times, there can be only one prosecution for receiving stolen property. People v. Bauer, 1 Cal.3d 368, 82 Cal.Rptr. 357, 461 P.2d 637 (1969); People v. Lyons, 50 Cal.2d 245, 324 P.2d 556 (1958); Annot. 28 A.L.R.2d 1182, 1184 et seq."

This Court gave the foregoing opinion of Double Jeopardy. The State brought the same charges from the same continuing act and used the same evidence, therefore causing double jeopardy.

This Court has also stated "The amended notice does not attach a copy of the motions appealed from. See Rule 12-202 (B) NMRA

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2003 This rule does not address any specific wording for appeals from motions denied, but not heard. Motions which are not heard are deemed denied, therefore there is no order to attach, although State Law deems it an order denied. The last motion that the Appellant filed was a Motion to Quash the Bench Warrant. (RP 539-540) which has never been ruled on, which would be the part of the Notice of Appeal. The other part of the Notice of Appeal would be Double Jeopardy. 30-1-10 N.M.S.A. 2003, and the right to appeal under the Interstate Compact , 31-5-20 N.M.S.A. 2003, these two statues would override a need for a judgment or order since the statue and rules thereof give the right to an appeal, without a judgment or order. To ignore the Statues would result in no State remedies and the Federal Courts would then have jurisdiction, since it would be a violation of Civil Rights of Appellant under the Constitution of the United States, and the Constitution of the State of New Mexico. This Court has previously stated "unusual circumstance which would warrant permitting an untimely appeal might arise if the delay was the result of judicial error." To deny a party the constitutional right to an appeal because of a mistake on the part of the court runs against

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the most basic precepts of justice and fairness. The record shows that Appellant is not noticed on anything even when Counsel withdraws. This court has previously stated in State v Peppers, 110, N.M. 393, 796 P.2d 614 (Ct App. 1990) "that Appellant's appeal was the consequence of ineffective assistance of counsel, the appeal was treated as if the notice had been filed timely", Counsel entered his appearance on November 19, 2001, (RP 409) and withdraws of January 16, 2003 (RP 536-538). The only motions Counsel files in this case over the course of 14 months is the Motion to Quash Subpoena Duces Tecum (RP 435), two motions for continuance of hearings (RP419 & RP 465) neither is as a result of Appellant; and Motion to withdraw (RP 536-538). All motions otherwise filed were done by Appellant. Double Jeopardy occurred Counsel, 11th Judicial District Court, and State District Attorney were apprised. Counsel does not file motion to dismiss. Counsel does not appeal anything to Court of Appeals, fundamental error occurs. The transcripts have been provided to this Court so they have an accurate account of what has been done, along with the Record Proper.

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The Appellant has raised the issue of Double Jeopardy, Violation of Due Process, in the Amended Docketing Statement. The Docketing Statement raises 13 issues in detail the violations of State Statues, Procedural law, Constitution of the United States, and the Constitution of the State of New Mexico, as well as case law. The issues at hand can be appealed since the record proper and transcripts clearly validate the events. The 11th Judicial District Court has had a chance to rule on issues and the denials of fundamental rights such as due process have occurred. The Motion to Dismiss filed November 13, 2001 (RP 385) even states "5.The Motion for Probation Revocation was not prompted by the Probation Officer, or any report, but entirely as the actions taken by Chief Deputy Assistant District Attorney." The Court knows there was no referral of revocation just the Motion to Revoke (RP 330). The 11th Judicial District denies Appellants due process rights by denying the Motion on March 6, 2002 (RP 426). The issues raised go to how the convictions were obtained which violates Due Process and numerous Civil Rights of Appellant. Convictions should reverse due to Double Jeopardy and violation of Due Process.

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WHEREFORE, the Appellant CHERI SMITH, respectfully requests this Court to enter an order assigning this case to the summary calendar proposing summary reversal. Cheri Smith also requests such other and further relief as this Court Deems just and proper. PRO SE AND LAYMAN AT LAW

Signed this 4th Day of May 2003

By: _____

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crsmith82@yahoo.com

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CERTIFICATE OF SERVICE

I hereby Cheri Smith, hereby certify that on May 4, 2003 a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PROPOSED SUMMARY DISMISSAL** were Faxed/Mailed to the following:

Clerk of the New Mexico Court of Appeals
Supreme Court Building
P O Box 2008
Santa Fe, NM 87504
Facsimile 505-827-4946
Telephone 505-827-4925

Appellate Division Attorney General
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Facsimile 505-827- 5826
Telephone 505-827- 6000

On May 4, 2003

Respectfully submitted,

By: _____

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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff-Appellee,

VS.

CHERI SMITH, Defendant-Appellant.

No. 23,725

COURT OF APPEALS
STATE OF NEW MEXICO
JANE WALLACE, CLERK
2005 AUG -6 AM 9:52

A. JOSEPH ALARID
Presiding Judge
JAMES J. WECHSLER
Chief Judge
RODERICK T. KENNEDY
Judge

ORDER ON MOTION FOR REHEARING

In this cause, a motion for rehearing having been filed by Appellant, and consideration having been had by all of the panel members of the original panel, **IT IS ORDERED** that the motion for rehearing is hereby DENIED.

Presiding Judge